RECENT CASES

Constitutional Law—Censorship of Films Used on Television— The Pennsylvania State Board of Censors issued a regulation requiring that all motion picture film intended for broadcast by television stations located in Pennsylvania be submitted to the Board for censorship.[1] Five federally licensed stations in the Commonwealth brought this action for a declaratory judgment to determine the validity of this regulation. The regulation was held invalid on the ground that the Federal Government has fully occupied the field of television control.[2] *Allen B. DuMont Laboratories v. Carroll,* 86 F. Supp. 813 (E.D. Pa. 1949).

The several states may, in the absence of federal action, regulate interstate commerce as to matters of local concern, not requiring a uniform national regulation.[3] However, when Congress has provided a system of regulation the states may not attempt to supplement it,[4] nor may they act so that their policies reach a result inconsistent with the federal regulations.[5] Federal control of television is derived from the Communications Act of 1934 which established the Federal Communications Commission.[6] The Act specifically provided, however, that the Commission would not have any power of censorship.[7] This elimination of prior restraint did not leave the Commission without power to exercise influence over the content of radio and television programs. The system provided by the Act leaves the primary decision as to program content to the stations, but they must answer to the Commission for failure to broadcast in the public interest.[8] If the FCC is not satisfied with a station's performance, it has in its arsenal the tremendous sanction of refusing to renew its license.[9] Thus, Congress

1. There is no statute which would authorize the Pennsylvania censors to act in regard to "live" television shows. The censors' action was taken under the motion picture censorship act: "It shall be unlawful to . . . exhibit any motion picture film, reel or view in Pennsylvania . . . unless duly approved by the Pennsylvania State Board of Censors." PA. STAT. ANN., tit. 4, § 42 (Purdon, 1930).

2. The court also affirmed, without comment, plaintiff's request for conclusions of law (1) that censorship is an unreasonable burden on commerce and (2) that television is included in the "Press" whose freedom is guaranteed by the First and Fourteenth Amendments. If the Circuit Court should not agree that Congress has fully occupied this field, the above two points must then be faced.

3. *E.g.,* Cooley v. Board of Port Wardens of Philadelphia, 12 How. 298 (U.S. 1851).

4. LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1949) (state can't certify collective bargaining agent for interstate industry even though federal agency has taken no action); Hines v. Davidowitz, 312 U.S. 52 (1941) (state alien registration when federal has such registration); Erie R.R. v. New York, 233 U.S. 671 (1914) (state maximum hours of work less than federal).

5. Hill v. Florida, 325 U.S. 538 (1945).

6. 48 STAT. 1064 (1934), 47 U.S.C. § 151 *et seq.* (Supp. 1948). Though the Act does not mention television, there is no question that it is included under "radio" as used in the Act. Oppenheim, *Legal Aspects of Television,* 8 AIR L. REV. 13, 26 (1937).

7. 48 STAT. 1064, 1091 (1934), 47 U.S.C. § *326* (Supp. 1948).

8. 48 STAT. 1064, 1085 (1934), 47 U.S.C. § 309(a) (Supp. 1948).

9. *Ibid.;* Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850, 853 (D.C. Cir.), *cert. denied,* 284 U.S. 685 (1932) (denying renewal of license because of offensive programs is not a taking of property without due process, nor is it censorship or previous restraint). Actually such action by the Commission is previous restraint in the sense that the station is prevented from committing further offenses.

dealt fully with the possible abuse of radio and television in choosing a method of self-regulation which avoided the dangers to free expression inherent in censorship. The failure of Congress expressly to prohibit state censorship, while forbidding censorship by the FCC, almost certainly resulted from failure to anticipate that the states would assert such power, rather than from a desire to allow state censorship.[10]

There has never before been any adjudication of a state's power to censor radio, since the states have never attempted to impose such restrictions.[11] On the other hand, state censorship of motion pictures was early approved as a proper exercise of the police power.[12] However, no question of federal supremacy has arisen in regard to motion picture censorship, since the federal government has never regulated the content of motion pictures.[13] There is an even greater public interest against immorality and obscenity in television than in motion pictures, due to the intrusion of television into the home. Since each television program is shown only once, the boycott sanction, used by pressure groups to force the movies to adhere to certain standards, cannot succeed in the new industry.[14] Even if there were no federal system of control, state censorship would be too burdensome to be allowed. The short periods for which television stations rent film, plus the impossibility of foreseeing when a certain film will be needed, make the close deadlines of television incompatible with the time-consuming process of censorship.[15] Hence the need for federal control is accentuated, yet the present system of federal regulation is inadequate in that the FCC has no administrative sanction to punish misconduct except by suspension of license.[16] This one sanction is far too strong to use against minor or infrequent violations, which are thus likely to remain unpunished.[17] This problem caused little trouble in radio since the line between good taste and obscenity in the spoken word is drawn with little difficulty, so that any violation could be classified as flagrant or deliberate. Television differs in that the boundary lines of obscenity in pictures and decor are more tenuous, thus making it more difficult to justify such

10. 67 CONG. REC. 5480 (1926).

11. *Cf.* National Broadcasting Co. v. Board of Public Utility Comm'rs, 25 F. Supp. 761 (D.N.J. 1938) (state cannot require certificate of public convenience to operate a radio station). The states do retain jurisdiction over offenses that only incidently occur in connection with radio, *e.g.*, Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), *cert. denied*, 290 U.S. 599 (1935) (libel); Johnson v. WOW, 326 U.S. 120 (1945) (fraudulent conveyance of radio station).

12. "The exhibition of motion pictures is a business, pure and simple . . . like other spectacles, and not . . . part of the press." Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915). This case was decided while motion pictures were still silent, and also before Near v. Minnesota, 283 U.S. 697 (1931) established the prohibition against state censorship of the press. Many modern writers believe that the Supreme Court would ban motion picture censorship if the question were presented again. CHAFFEE, GOVERNMENT AND MASS COMMUNICATIONS 240 (1947), ERNST, THE FIRST FREEDOM 268 (1946).

13. Except for 46 STAT. 688 (1930), 19 U.S.C. § 1305 (1937) which prohibits importation of obscene pictures from abroad.

14. *E.g.*, The Legion of Decency. Boycotts against television stations, except by advertisers, would be highly impractical since most viewers have only one or two stations from which to choose and would be unwilling to give up television completely.

15. For a discussion of the practical difficulties which would be forced upon television by censorship, see Bergson, *State Censorship of Television*, 10 FED. B.J. 151 (1949).

16. Obscenity by radio is punished only by criminal action in the federal courts. 18 U.S.C. § 1464 (1948).

17. The FCC never revoked the license of a "major" station until 1945 (WOKO, Albany) and this was for concealment of station ownership, not obscenity. WHITE, THE AMERICAN RADIO 180 (1947).

severe punishment. The solution would seem to be a continuation of the present system of leaving primary control in the hands of the broadcasters, but with the addition of a new power to the FCC allowing it to levy fines for instances of indecency.[18]

Criminal Law—Causation—Responsibility of Robber for a Killing by a Policeman—Defendant and two others, who had planned a hold-up and armed themselves with pistols, robbed a supermarket. As they fled to their car, two police cars drove up and attempted to block off their escape. During the ensuing gun battle a patrolman, who was then off duty, was killed while trying to subdue one of the robbers who was between him and the policemen. The trial judge charged that, in determining defendant's guilt under the Pennsylvania murder statute,[1] it would make no difference who fired the fatal shot. The Supreme Court, Jones, J. dissenting, affirmed a conviction of first degree murder with sentence of death, holding that defendant's wrongful act was the proximate cause of the patrolman's death although the fatal bullet was fired by a policeman. *Commonwealth v. Almeida,* 362 Pa. 596, 68 A.2d 595 (1949).

Criminal responsibility for a killing is imposed only where defendant's act[2] is a substantially contributing cause of death.[3] Even though the immediate cause of the death is the act of another person, responsibility may sometimes be imposed. For example, where defendant induces a physical response which results in death,[4] or knowingly furnishes an innocent or irresponsible person with the means to bring about death,[5] he is a legal cause of the death since his act is a substantially contributing factor in bringing about that result. However, where the immediate cause of death is the act of a responsible person who is stirred into activity by defendant's conduct, it has generally been held that defendant is not responsible,[6] on the theory that such an act intervenes between defendant's act

18. This proposal has been made by the Senate Committee on Interstate and Foreign Commerce, but no action has been taken. 95 CONG. REC. 561 (January 27, 1949).

1. PA. STAT. ANN., tit. 18, § 4701 (Purdon, 1945). "All murder which shall be . . . committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree."

2. Or the act of one acting in concert with him. *E.g.,* Spies v. People, 122 Ill. 1, 12 N.E. 865 (1887).

3. 2 BISHOP, NEW CRIMINAL LAW § 637 (9th ed., Zane & Zollmann, 1923). "The contribution, however, must be of such magnitude, and so near the result, that sustaining to it the relation of contributory cause to effect, the law takes it within its cognizance."

4. *E.g.,* Cox v. People, 80 N.Y. 500 (1880) (fright produced heart attack); Regina v. Towers, 12 Cox C.C. 530 (1874) (scream scared child into convulsions); *cf.* Regina v. Halliday, 61 L.T. 701 (1889) (defendant's threats made wife jump from window). See also note 8 *infra.*

5. Johnson v. State, 142 Ala. 70, 38 So. 182 (1905) (freeing insane man); Queen v. Saunders, 2 Plow. 473 (1576), 75 Eng. Rep. 706 (1905) (intended victim gave poisoned apple to her daughter not knowing it was poisoned apple to her daughter not knowing it was poisoned).

6. *E.g.,* Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905); Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888); Commonwealth v. Campbell, 89 Mass. 541 (1863); *see* Commonwealth v. Thompson, 321 Pa. 327, 330, 184 Atl. 97, 99 (1936); Commonwealth v. Mellor, 294 Pa. 339, 343, 144 Atl. 534, 535 (1928). *Contra:* People v. Payne, 359 Ill. 246, 194 N.E. 539 (1935). The *Moore* case is the only case holding directly *contra* to the instant decision, but both the *Butler* and *Campbell* cases have dicta strongly supporting the result in that case.

and the ultimate result thus rendering the relation between them insubstantial.[7] It would seem, therefore, that under the facts of the present case defendant would not be responsible, since the intervening responsible act of the policeman prevents any substantial relation between the felony and the patrolman's death. Furthermore, the result reached by the court cannot be supported by analogy to the shield cases [8] in which, although the fatal bullet is fired by another responsible person, there is an additional act by the criminal in forcing the victim into the line of fire.[9] Responsibility is imposed in these cases because this additional act is a substantially contributing cause of the death, and not because the criminal created a dangerous situation.[10] In the present case, the patrolman was not used as a shield; he came into the combat on his own initiative. Defendant's only act was that which created the dangerous situation, and that alone would not make him responsible.

Although there has been a tendency, particularly in Pennsylvania, to extend the limits of responsibility in cases of felony-murder,[11] the instant case represents a further step in its definition of what constitutes a substantially contributing cause.[12] Drawing an analogy to tort law,[13] the court lays down a standard of proximate cause in which it is sufficient that defendant's act initiate the chain of events which culminates in death, if the consequences which may result from the intervention of another human force are foreseeable by him.[14] Thus, since the robbers in the present case

7. WHARTON, HOMICIDE § 28 (3d ed., Bowlby, 1907). "To hold a person criminally responsible for a homicide, his act must have been the proximate cause of the death as distinguished from the cause of a condition affording an opportunity for the compassing of the death by some other unconnected agency." See also Note, 81 U. OF PA. L. REV. 189, 194 (1932). The determination of what constitutes an "unconnected agency" is, of course, a question of policy. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 256 *et seq.* (1947).

8. Wilson v. State, 188 Ark. 846, 68 S.W.2d 100 (1934); Taylor v. State, 41 Tex. Crim. Rep. 564, 55 S.W. 961 (1900); Keaton v. State, 41 Tex. Crim. Rep. 621, 57 S.W. 1125 (1900). The *Taylor* case apparently adopts the principles behind the *Butler* and *Campbell* cases. See note 6 *supra.*

9. Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947), relied on as authority by the court in the instant case, is virtually a shield case. See dissenting opinion of Gordon, P.J., in Commonwealth v. Almeida, 66 Pa. D. & C. 351, 373 (1949), which distinguishes the factual situations.

10. See note 7 *supra.*

11. Commonwealth v. Moyer, *supra;* Commonwealth v. Kelly, 333 Pa. 280, 4 A.2d 805 (1939); Commonwealth v. Doris, 287 Pa. 547, 135 Atl. 313 (1926); Commonwealth v. Lessner, 274 Pa. 108, 118 Atl. 24 (1922).

12. *Cf.* People v. Payne, *supra.* Letner v. State, 156 Tenn. 68, 299 S.W. 787 (1927), which appears to sustain the court's position, represents an extreme view. See Note, 55 A.L.R. 921 (1928). See HALL, *op. cit. supra* note 7, at 261: "No one is responsible for what others with whom he is not allied do or bring about."

13. Courts will frequently impose tort liability upon a negligent wrongdoer even though there was intervening negligent or even criminal conduct on the part of others. *E.g.,* Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied,* 321 U.S. 790 (1944) (torts of thieves when keys left in car); Nearing v. Ill. Cent. R.R., 383 Ill. 366, 50 N.E.2d 497 (1943) (girl left at unlighted station attacked); Brower v. N.Y. Cent. & H.R. RR., 91 N.J.L. 190, 103 Atl. 447 (1918) (theft of apples scattered by collision). *Contra:* Galbraith v. Levin, 323 Mass. 255, 81 N.E.2d 560 (1948) (same situation as *Ross* case, *supra,* recovery denied); *cf.* Ritter v. Olson, 263 Pa. 40, 68 A.2d 732 (1949) (man freeing stuck car did not apply brakes). The court appears to ignore the differences in objectives of criminal and tort liability. See Commonwealth v. Moyer, *supra,* commented on in 96 U. OF PA. L. REV. 278, 280 (1947). And see HALL, *op. cit. supra* note 7, at 188 *et seq.,* 258-261.

14. Commonwealth v. Moyer, *supra* at 190, 53 A.2d at 741. "It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit robbery or burglary sets in motion a chain of events which were or should

could foresee that policemen would intervene, and that someone might be shot in their efforts to escape, they are responsible just as though their act was the immediate cause of the patrolman's death. Although such a standard might appear very broad, it would seem that an armed felon will not be absolutely responsible for all acts of those attempting to apprehend him. The court stresses the fact that the policeman's response was a normal response under the circumstances. In view of the immediacy of the danger and the necessity for action to forestall further harm, it is foreseeable that a policeman might shoot and kill a bystander. In all probability future decisions will expressly limit the finding that the creation of a dangerous situation is a substantially contributing cause of a resulting death to situations where these factors are present.[15] Although the dissent argues that the problem is one of fact since the jury must in every case decide whether an unbroken chain of events existed,[16] the determination of the standard of causation to be applied calls for a decision of policy, to be declared by the court in the light of the objectives of criminal law [17] as well as the circumstances of each particular case.

Criminal Law—Federal Employees as Jurors in the Trial of a Communist—Gerhart Eisler, an Austrian national, was indicted in the District Court of the District of Columbia for knowingly making false statements in his application for permission to depart from the United States.[1] Whether defendant was a member of the Communist Party was an issue of the trial. The defendant moved to exclude all government employees from the jury on the ground that they were subject to investigation and discharge for Communist affiliation or sympathy,[2] and hence could not be impartial jurors. In affirming the conviction, the Circuit Court of Appeals, relying on the general principle that government employees are qualified jurors, summarily held that there was no error in denying defendant's motion.[3] *Eisler v. United States,* 176 F. 2d 21 (D.C. Cir. 1949).

---

have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act." (Quoted with approval in the instant case at 602, 68 A.2d at 599).

15. *Cf.* People v. Payne, *supra.* There the person whose act caused the death shot in defense of the victim. Without these factors, it is doubtful whether the intervening act would be a "normal response."

16. Commonwealth v. Kelly, *supra* at 288, 4 A.2d at 808. "The jury must first decide whether the homicide act was connected with the felony or was there 'a break in the chain of events.'" See dissent in instant case at 641, 68 A.2d at 617.

17. For an interesting discussion of the objectives of criminal law, see HALL, *op. cit. supra* note 2, at 188 *et seq.* See also Commonwealth v. Ritter, 13 Pa. D. & C. 258 (Phila. Q.S. 1930); Commonwealth v. Levin, 66 Pa. D. & C. 55 (Phila. Q.S. 1949).

---

1. 40 STAT. 559 (1918), 22 U.S.C. § 223(c) (1946). ". . . it shall . . . be unlawful. . . . For any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another."

2. This contention was based on the President's Loyalty Order. Exec. Order No. 9835, 12 FED. REG. 1935 (1947), which prescribed general rules for discovering and dismissing disloyal employees.

3. In summarily rejecting defendant's assignment of error, the court relied on Dennis v. United States, 171 F.2d 986 (D.C. Cir. 1948). That case can be distinguished from this one. Although the defendant there was a Communist, the court said, ". . . the case now before this court has nothing to do with the fact that Dennis is a Communist. It has solely to do with the question of whether he wilfully failed to respond to the subpoena of a lawful committee to Congress."

Prior to 1935, the Supreme Court had held that a government employee could not be a juror in an action to which the government was a party.[4] This rule was based on the supposition that bias would result from the employer-employee relationship.[5] However, after Congress enacted a statute making government workers eligible jurors,[6] the Supreme Court reconsidered its former position and upheld the act.[7] Consequently, the law now is well established that there can be no imputation of bias simply by virtue of government employment; [8] but the cases indicate that special and exceptional circumstances might arise in which the general rule would not be applicable. Thus far, no case has provided such an exceptional situation; [9] and the mere possibility of government workers fearing the loss of employment has expressly been held not a sufficient ground, without more, to impute bias.[10] Nevertheless, the defendant in the instant case contended that the President's Loyalty Order [11] which provided for dismissal of government employees with Communist affiliation or sympathy brought this case within the special circumstances exception to the general rule.

The previous cases holding that fear of loss of employment was too remote a contingency to imply bias are readily distinguishable on their facts from the instant case.[12] None of them, with the exception of the *Dennis* case, even mentioned the question of Communist affiliation or sympathy, and in the *Dennis* case the court said that the fact that the defendant was a member of the Communist Party had no bearing on the issue.[13] In addition, when the leading cases were decided the civil service regulations offered adequate protection to the worker. Discharge could be had only for cause [14] which did not include sympathy for certain political views. This protection was not available to government employees after the Loyalty Order went into operation. At the time of Eisler's trial the government was conducting an intensive campaign to root out all subversive elements. In most cases of alleged disloyalty the guilt or innocence of the accused government employee turned on charges of association with

4. Crawford v. United States, 212 U.S. 183 (1908).

5. This view was based primarily on 3 BL. COMM. *363, where it was said one is not competent as a juror if he is a party's master, servant, counsellor, steward, or attorney.

6. 49 STAT. 682 (1935), D.C. CODE, tit. 11, § 1420 (1940) (with certain specified exceptions government employees were declared qualified jurors).

7. The statute was held not to violate the Sixth Amendment after a re-examination of the common law authorities produced no settled policy of disqualifying Crown employees from jury service where the king was a party. United States v. Wood, 299 U.S. 123 (1936); 50 HARV. L. REV. 692 (1937).

8. *E.g.*, United States v. Wood, *supra;* Higgins v. United States, 160 F.2d 222 (D.C. Cir. 1946); A & P v. District of Columbia, 89 F.2d 502 (D.C. Cir. 1937).

9. Several cases indicated, however, that one possible exception is where the jurymen are employed by the department most vitally affected by the litigation. *E.g.*, Higgins v. United States, *supra;* Jordan v. United States, 87 F.2d 64 (D.C. Cir. 1937).

10. *See* United States v. Wood, *supra*, at 150. "It is suggested that an employee of the government may be apprehensive of the termination of his employment in case he decides in favor of the accused in a criminal case. Unless the suggestion be taken to have reference to some special and exceptional case, it seems to us far-fetched and chimerical."

11. The heart of this document is part IV, § (f), which provides that a government employee may be considered disloyal on the basis of affiliation with or sympathetic association with any organization designated as subversive.

12. *E.g.*, Frazier v. United States, 335 U.S. 497 (1948) (involved a prosecution for violation of the Harrison Narcotics Act); United States v. Wood, *supra.*

13. Dennis v. United States, *supra.*

14. FIELD, CIVIL SERVICE LAW, 187-198 (1939).

other persons tainted with suspicion.[15] Naturally, therefore, an average government worker could reasonably be expected to be apprehensive of acquitting a Communist.[16] In view of these facts, the court could have justifiably distinguished the other cases, and found bias growing out of the unique conditions of this particular case. By refusing to do so, the court has rejected what apparently is the strongest possible combination of circumstances that could make for an exception to the rule. In effect, then, it seems to have read out of the previous decisions the possibility that such an exception could arise.

Income Taxation—Deductibility of Payments Made Under Agreement Incident to Divorce—Petitioner was granted a Florida divorce without personal service on his wife, a New Jersey resident, and without appearance on her behalf. Eight months after the divorce, he concluded a written agreement with his ex-wife promising to pay her support money in consideration of her promise not to "contest or bring any action . . . to set aside, nullify, or question the . . . decree of divorce." An income tax deduction by the petitioner for payments made under this agreement was disallowed. The decision of the Tax Court [1] sustaining the disallowance was affirmed on the ground that the agreement was not "incident to" the divorce within the meaning of the Code.[2] *Cox v. Commissioner,* 176 F. 2d 226 (3d Cir. 1949).

Prior to 1942, for income tax purposes, a husband's payments to his wife during marriage and after divorce were neither includible in her gross income [3] nor deductible from his.[4] In the Revenue Act of 1942, Congress remedied this hardship upon the alimony-paying spouse [5] by providing, in general, that payments by a husband to his divorced or legally separated wife are taxable income of the wife [6] and deductions for the husband.[7] These provisions apply not only to periodic support payments ordered by the divorce decree but also to such payments made pursuant to a written agreement between husband and wife if the instrument is *"incident to* such divorce or separation." By including these agreements, Congress recog-

15. ROGGE, OUR VANISHING CIVIL LIBERTIES (1949). See especially chapters 10-13, where the author gives numerous examples. Generally on the effect of the Loyalty Order, see O'Brian, *Loyalty Tests and Guilt by Association,* 61 HARV. L. REV. 592 (1948); Emerson and Helfeld, *Loyalty Among Government Employees,* 58 YALE L.J. 1.

16. *See* Frazier v. United States, *supra,* at 514 (dissenting opinion).

1. Benjamin B. Cox, 10 T.C. 955 (1948) (3 judges dissenting).

2. INT. REV. CODE § 23(u) allows as deductions from gross income those amounts includible in gross income of his wife under § 22(k) which provides as follows:

"Alimony, etc., income. In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments . . . received subsequent to such decree in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or *under a written instrument incident to such divorce or separation* shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. . . ." (Italics added.)

3. Gould v. Gould, 245 U.S. 151 (1917).

4. Douglas v. Wilcox, 296 U.S. 1 (1935).

5. H.R. REP. No. 2333, 77th Cong., 2d Sess. 71-72 (1942); SEN. REP. No. 1631, 77th Cong., 2d Sess. 83 (1942).

6. INT. REV. CODE § 22(k). See note 2 *supra.*

7. INT. REV. CODE § 23(u). See note 2 *supra.*

nized that under certain circumstances parties prefer not to open their financial arrangements to the public in the divorce decree.[8] However, the courts have encountered some difficulty in determining when agreements not incorporated by reference in the decree are "incident to" the divorce.[9] Although agreements made prior to the decree have been held "incident to" the divorce,[10] the Tax Court, to date, has ruled that payments under an instrument made *subsequent* to the decree are not deductible.[11] The court has considered such payments gifts because the legal obligation to support is generally terminated by the divorce decree. However, when a divorce is granted upon constructive service of process without appearance by the wife, as in the instant case, she may recover alimony at the matrimonial domicile in an independent action.[12] By indicating, in effect, that an instrument must be executed prior to or coincident with the divorce decree to be "incident to such divorce," [13] the Circuit Court has applied previous interpretations of the Act to a situation which might impel a broader construction to avoid unusual tax consequences.[14]

Under the circumstances of this case, the divorce decree did not end the obligation to support, and payments made under the subsequent agreement were in recognition of the husband's legal duty. If the Act is limited to obligations made prior to or contemporaneous with the divorce decree, payments made under an independent alimony decree, or an agreement in lieu thereof, would not be deductible by the husband. Thus, the wife may be inclined to shift the tax burden to her ex-husband by claiming alimony in a separate action rather than entering an appearance in a divorce suit instituted against her by constructive service. It is improbable that Congress intended such an application of an act which was specifically drafted to relieve the husband who has a *legal* obligation to support his ex-wife.[15]

---

8. Another situation in which an agreement must be used to make financial arrangements is presented by the Pennsylvania rule which prevents the award of alimony by the court in an absolute decree of divorce. However, in Tuckie G. Hesse, 7 T.C. 700 (1946), payments under an agreement for support were held to be deductible by the husband.

9. *E.g.,* Commissioner v. Murray, 174 F.2d 816 (2d Cir. 1949) (agreement changing terms of alimony granted in decree held "incident"), *reversing* 7 CCH 1948 TC MEM. DEC. ¶ 16,452 (1948); Frank J. DuBane, 10 T.C. 992 (1949) (agreement subsequent to divorce which reduced to writing oral agreement made prior to divorce held "incident"); Robert Wood Johnson, 10 T.C. 647 (1949) (agreement conditioned on wife's applying for divorce held "incident"); Frederick S. Dauwalter, 9 T.C. 580 (1947) (agreement subsequent to divorce held not "incident"); Tuckie G. Hesse, *supra.*

10. Robert Wood Johnson, *supra;* Tuckie G. Hesse, *supra.*

11. Frederick S. Dauwalter, *supra; cf.* Frank J. DuBane, *supra.*

12. Toncray v. Toncray, 123 Tenn. 476, 482-492, 131 S.W. 977, 978-981 (1910); Turner v. Turner, 44 Ala. 437, 451 (1870); Thurston v. Thurston, 58 Minn. 279, 59 N.W. 1017 (1894); Cox v. Cox, 19 Ohio St. 502, 512 (1869); *cf.* Thompson v. Thompson, 226 U.S. 551 (1913) (statute of state issuing divorce decree prevented alimony to wife under any circumstances). Some statutes give wife a claim for alimony in an independent suit subsequent to divorce. *E.g.,* N.J. STAT. ANN., tit. 2, § 50-37 (Supp. 1949).

13. ". . . 22(k) envisages a situation in which the agreement . . . is part of the package of the divorce. The term 'divorce' . . . does not refer to status, but encompasses the breaking-up of the marriage eventuating in its dissolution, and divestment of marital obligations as provided in the decree." Instant case at 229.

14. The instant decision appears to be the only appellate consideration of a situation in which a subsequent agreement provided for support payments in the absence of any alimony arrangements in the divorce decree. *Cf.* Commissioner v. Murray, *supra,* in which a subsequent agreement changed the terms of the alimony provided in the decree.

15. See note 5 *supra.*

Therefore, it appears that "incident to such divorce" should be construed to refer to the continuing status of the *legal obligation to support* and not to the *time* of the agreement relative to the divorce decree. Only such an interpretation would give effect to the legislative purpose of the enactment.

Income Taxation—Deductibility of Premiums Paid for Convertible Bonds Under the Amortization Provisions—A cash basis taxpayer in 1944 invested $60,000 in A. T. & T. 3% convertible bonds. These bonds had a face value of only $50,000, but were callable on thirty days notice for $52,000. They also contained a stock purchase option under which the bonds could be exchanged for A. T. & T. stock.[1] The high premium ($10,000) was attributable in large part, if not entirely, to this convertible feature.[2] Since the taxpayer did not dispose of the bonds in 1944, he deducted from his gross income for that year $8,000 pursuant to the statutory provisions relating to "amortizable bond premium."[3] The Commissioner of Internal Revenue, asserting that the premium was manifestly paid for the option to purchase stock, and not to secure a more favorable interest rate, disallowed the deduction. On appeal, the court held the deduction proper. *Commissioner v. Korell,* 176 F. 2d 151 (2d Cir. 1949). In another circuit, in a case involving the same issue of bonds but a different taxpayer, the court sustained the Commissioner. *Commissioner v. Shoong,* 177 F. 2d 131 (9th Cir. 1949).

Prior to 1942 cash basis taxpayers were not permitted to amortize bond premiums, and such amounts were treated as capital loss when the bonds matured, if not previously sold or exchanged. This treatment, however, was not in accord with sound accounting practice, and resulted in a distortion of the taxpayer's true income.[4] In the ordinary case "bond premium" is an amount paid for a bond in excess of its maturity value because the interest rate to be received is higher than the prevailing rate. In such a situation a pro rata part of the premium should be considered as allocable to each year's interest, and therefore deductible in computing the true yield of the bond. For example, if the prevailing rate of interest is 2½%, a $1,000 bond bearing interest at 3% and due in 1960 might sell today for $1,050. The purchaser of the bond would receive $30 "interest" annually, but only $25 of this amount would be true income, the remaining $5 being a return of capital. Motivated by a desire to have income under the tax law reflect as nearly as possible the true income of the taxpayer,

1. The bondholder was entitled to purchase A.T. & T. common stock, then selling for $163 per share, by paying $40 in cash and surrendering $100 of the principal amount of the bonds for each share of stock.

2. The stock consistently sold for about $40 more than the bonds from June 1943 to August 1947. The differential of 40 was obviously controlled by the $40 cash payment required for conversion. See note 1, *supra.* Under the circumstances which existed here, such a price relationship is normal. See JOME, CORPORATION FINANCE, 195, 196 (1948); BURCHETT, INVESTMENTS AND INVESTMENT POLICY, 219 (1938).

3. INT. REV. CODE §§ 23(v), 125; U.S. Treas. Reg. 111, § 29.125-1 *et seq.* (1943). In the case of a callable bond, the bond premium is the excess of the basis for determining loss (usually cost) over the amount payable on the earliest call date. Amortizable bond premium is the part of the premium attributable to the taxable year. Here, since the bonds were callable on thirty days notice, if any part of the premium was deductible, it was all attributable to the taxable year.

4. "The want of statutory recognition of the sound accounting practice of amortizing premium leads to incorrect tax results." H.R. REP. No. 2333, 77 Cong., 1st Sess. (1942); 1942-2 CUM. BULL. 410 (1942); Hearings before Committee on Ways and Means on H.R. 7378, 77th Cong., 1st Sess. 90, 117; SPRAGUE, THE ACCOUNTANCY OF INVESTMENT §§ 109, 119, 121 (Perrine's ed. 1918).

Congress in 1942 amended the Code to allow a deduction each year for the "amortizable bond premium" attributable thereto.[5] Congress thus recognized that only the actual yield of a bond should be considered income.[6] However, the amendment was not phrased to exclude premiums paid for a convertible feature, and the term "bond" was defined very broadly. Moreover, the committee reports stated that in the case of convertible bonds, if the option to convert the bonds was in the owner, the deduction would be allowed.[7] Even the Treasury Regulations did not distinguish between premiums paid to secure a higher rate of interest, and other premiums.[8] In the *Korell* case the court concluded that the plain language of the Code, in conjunction with the explanation in the Committee reports, was too strong an indication of the intent of Congress to permit reading into the statute a limitation as to the kind of bond premium for which the deduction is allowable. In contrast, the court in the *Shoong* case thought that the reasons which led Congress to amend the law should be kept in mind in deciding what premiums are deductible. Looking at the entire history of the provision, and noting that deductions are always construed narrowly, the court held that "amortizable bond premium" does not include an amount paid primarily for an option to purchase stock.

The premium, in the instant cases, was obviously paid for the stock option, and not, as in the case of the ordinary bond premium, for an interest return above the prevailing rate.[9] Under these circumstances it would seem that the deduction of loss, if any, should await disposition of the bonds. Cash basis taxpayers have always been limited to deductions for expenses and costs actually incurred in the taxable year, and have never been permitted to deduct purely hypothetical losses.[10] Here, the premium for the bond was paid to obtain an option to purchase speculative stock, not a better rate of interest; actual loss was contingent upon a decline in the

5. INT. REV. CODE §§ 23(v), 125. Another purpose was to prohibit an unjustifiable deduction of bond premium as a capital loss by holders of fully tax exempt bonds, who under the prior law were permitted to treat such premiums as a capital loss at maturity of the bonds in spite of the fact that the corresponding amount of capital had been recovered in the guise of interest and no tax had been paid upon it. See 1942-2 CUM. BULL., 410, 432 (1942).

6. To illustrate: T buys a fully taxable 3% bond on Jan. 1, 1950 for $1,050. At maturity, on Jan. 1, 1960 T will receive $1,000. The interest, $30, must be included in gross income each year. If *T* does not elect to amortize the $50 premium, assuming he is a cash basis taxpayer, he will be entitled to a capital loss deduction of $25 in 1960 ($50 recognized loss, but only 50% taken into account). But if he wishes, *T* may elect to "amortize" the premium, and deduct $5 in each of the ten years intervening between purchase and maturity. In that event, of course, *T* will have no capital loss in 1960, since he is required to reduce the basis for computing gain or loss by the amount of the amortization.

7. 1942-2 CUM. BULL. 433, 576 (1942).

8. "The fact that the bond is callable or convertible into stock does not, in itself, prevent the application of § 125. . . . A convertible bond is within the scope of § 125 if the option to convert on a date certain specified in the bond rests with the holder thereof." U.S. Treas. Reg. 111, § 125-5 (1943). The Commissioner contended that the words "on a date certain specified in the bond" barred application of the deduction to the bonds in the instant cases, but the Tax Court (10 T.C. 1001) and the Second Circuit Court of Appeals held that the quoted words were an invalid part of the regulations.

9. See note 2 *supra*. "The evidence incontrovertibly sustained the Commissioner's holding that the premium was paid solely for the stock purchasing covenant." Commissioner v. Shoong, *supra*.

10. Gregory v. Helvering, 293 U.S. 465 (1935) (reorganization not given effect as a tax-free exchange where no business purpose evident, although carried out in the precise form required by the statute for non-recognition of gain or loss); Higgins v. Smith, 308 U.S. 473 (1940) (deduction denied for loss on sale of stock to wholly owned corporation notwithstanding statutory language appearing to permit it).

price of A. T. & T. common stock, and was not, as in the case of the ordinary bond premium, certain to be realized by the mere passage of time.[11] Moreover, the effect of permitting the deduction was not only to give the taxpayer an election as to which year he would report a substantial part of his income, but also, because of the favorable treatment of long term capital gain, to avoid altogether the tax on an amount equal to one-half of the deduction, when the bonds are later sold. Thus, in the *Korell* case, notwithstanding the $8,000 deduction in 1944, if the bonds had been sold in 1945 for cost after being held for six months, only $4,000 would have to be returned as taxable income in 1945 because of the special provisions applicable to capital gain.[12] That Congress could have intended such an unreasonable result is inconceivable.[13] Although the decision in the *Korell* case may be justified by the language of the Code and the committee reports, it wholly disregards the artificiality of the alleged deduction, and the absence of any relation to true income. On the other hand, the conclusion in the *Shoong* case would appear to be in accord with the intent of Congress to limit taxable income from a bond to the actual yield. Moreover, the decision recognizes that as a practical matter, the taxpayer's true income has not been adversely affected by the mere passage of time, as it would be in the case of the ordinary bond premium.[14]

Income Taxation—Transfer of Corporate Assets to a Family Partnership—The taxpayer, sole owner of a manufacturing corporation, decided to change the form of business to a partnership. He then made an absolute gift to his wife of one-half of the corporate stock. Three weeks later, the taxpayer and his wife transferred the corporate assets to the newly formed partnership, thereupon executing a partnership agreement providing for equal sharing of profits but with the exclusive management vested in the taxpayer. Commissioner contended that the taxpayer is taxable on his wife's share of partnership earnings as well as his own, since the wife performed no business services and contributed no capital which originated with her. The Tax Court rejected the Commissioner's contention, holding that the wife was a partner for tax purposes since the parties "intended" to carry on the business as a partnership. *Edward A. Theurkauf*, CCH 1949 FED. TAX REP. ¶ 17,226 (T.C. 1949).

Generally where there is an absolute intra-family transfer of income producing property the donee is taxable on the income earned after the transfer.[1] A donor's attempt, however, merely to assign future income for

11. The premium that an ordinary bond will command gradually diminishes as the bond approaches maturity, or an earlier call date.

12. INT. REV. CODE § 117(b). Only 50% of gain or loss from sale of a "capital asset" held for more than six months is taken into account.

13. In this respect the *Shoong* case is particularly striking. Taxpayer in 1944 purchased $500,000 principal amount of convertible bonds for $606,000. He sold these bonds in Jan. 1945 for $621,000. Nevertheless, he claimed, and the Tax Court on the authority of the *Korell* case allowed, a deduction from gross income for 1944 of $81,000, thereby reducing his 1944 income tax by more than $60,000. In computing gain on the sale in 1945 the taxpayer, of course, subtracted the $81,000 from his basis, thus increasing the recognized gain by that amount; but inasmuch as only 50% of the gain is taken into account, the net tax saving to the taxpayer, if permitted to deduct the premium in 1944, would be very large.

14. "The stock option value of the bonds here involved would not decrease by the mere passage of time to the call or maturity date contemplated by the statute." *Shoong* case, *supra*.

1. *Cf.* Blair v. Comm'r, 300 U.S. 5 (1937); Austin v. Comm'r, 161 F.2d 666 (6th Cir. 1947).

relatively short periods of time while at the same time retaining complete control and management over the income producing property is ineffectual to transfer the tax liability to the assignee.[2] The result in these gratuitous assignment cases has been based on the rationale that while under state law there has been a valid transfer of property, for federal revenue purposes, the person who controls the economic source of the income is subjected to the tax.[3] Following this reasoning the Supreme Court in *Comm'r v. Tower,* on facts nearly identical with those of the instant case, sustained the Tax Court's determination that the donor, as the exclusive managing partner, was taxable on the entire partnership earnings.[4] The donor was said to have retained the economic control over the donee's partnership interest because the substance of the transaction clearly revealed that the donor was merely distributing a portion of his business income to other family members without changing his economic position in relation to the business. The mere fact that the form of the gift was conditional upon the donee placing her share of the corporate assets into the contemplated partnership was thought to be irrelevant.[5] More recently, however, in *Comm'r v. Culberston* the Supreme Court has held that a partner's status for tax purposes cannot be determined solely by such objective factors as active participation in the business or original capital contribution.[6] The Court emphasised that the correct approach is to examine all the circumstances under which the partnership is formed in order to determine whether the parties *subjectively intended* to carry on the business as a partnership.[7] In the few decisions since *Comm'r v. Culberston,* the Tax Court has sharply divided both as to the meaning and application of this subjective standard.[8] The majority of the court in the instant case distinguished *Comm'r v. Tower* on the strength of the taxpayer's testimony that there had been no condition attached to the gift of corporate stock requiring his wife to transfer her share of the corporate assets to the contemplated partnership. The court, attempting to follow the subjective intent standard of the *Culberston* case, gave decisive weight to the form of the gift ignoring the substance of the transaction, *i. e.,* that the organization of the contemplated partnership had already been decided upon shortly prior to the gift of the corporate stock.

Although the split-income provision of the Revenue Act of 1948 has eliminated the problem of husband-wife partnerships,[9] yet the effect of the *Culberston* decision, as exemplified by the instant case, will give additional impetus to arrangements which contemplate spreading the business income over other family members as inactive business partners.[10] The standard

2. Helvering v. Horst, 311 U.S. 112 (1940); Helvering v. Clifford, 309 U.S. 331 (1940).

3. See Mr. Justice Stone in Helvering v. Horst, *supra,* at 114, "Underlying the reasoning in these cases is the thought that income is 'realized' by the assignor because he, who owns or controls the source of the income also controls the disposition of that which he could have received himself and diverts the payment from himself to others as means of procuring the satisfaction of his wants."

4. Comm'r v. Tower, 327 U.S. 280 (1946).

5. *Id.* at 287.

6. Comm'r v. Culberston, 69 Sup. Ct. 1210 (1949).

7. Manheimer & Mook, *A Taxwise Evaluation of Family Partnerships,* 32 IOWA L. REV. 436 (1948).

8. See *E.g.,* W. F. Harmon, CCH 1949 FED. TAX REP. ¶17, 196 (T.C. 1949).

9. INT. REV. CODE § 12(d).

10. In this connection it seems favorable from the taxpayer's standpoint to sue for a tax refund in the federal district court since he can there demand a jury trial on the subjective intent issue, rather than choose the deficiency route to the Tax Court.

of appraisal imposed by the Supreme Court in the *Culberston* case is vague in that it does not disclose what objective guides are to be utilized in ascertaining the intent of the parties.[11] The instant result demonstrates the susceptibility of the *Culberston* decision to a meaning opposed to the basic principle that the income tax is based on the ability to pay, since it sanctions a sham transaction whereby the taxpayer escapes the normal operation of the progressive tax. Looking through the form of the so-called absolute gift, the substance of the transaction here reveals that the family producer of income, while retaining his economic control over the business, has merely distributed the business earnings over other family members to obtain the advantage of the lower surtax rates.[12] Since the *Culberston* decision clearly does not require the instant result it seems desirable that the Treasury promulgate regulations fixing the tax burden on the donor, who as the moving spirit in the formation of the family partnership actually creates the right to receive the business earnings.[13]

Public Utilities—Free Transfers in Street Railway Rate Schedule Banned as "Unreasonably Discriminatory"—Petitioner sought a base fare increase from the PUC to meet higher operating costs and a reduced level of riding. The profferred rate schedule retained the petitioner's free transfer system. The commission found a necessity for increased revenues, but it declared the petitioner's plan unduly discriminatory in so far as multiple-vehicle passengers paid the same rate as did single-car riders. To meet the deficit it was ordered that charges be levied upon transfers. *City of Philadelphia v. Philadelphia Transportation Co.,* Pa. P. U. C., Docket #14522 (1949).

Public Utility Commissions have been designed to protect the public interest in the activities of utility companies.[1] They are concerned both with the adequacy of service afforded their customers and with the reasonableness of the cost of such service. In investigating the latter consideration the commissions must deal with two problems: first, whether the entire revenues of the utility are unreasonably high or low; and second, whether the revenues are collected on an equitable basis from the individual consumers of the utility product.[2] Breach of the latter demand is usually caused by unduly preferential or discriminatory rates.[3] Many commissions have considered whether the free transfer phase of street railway fares was unreasonably discriminatory. Tramways are generally laid out in a grid pattern with transfer privileges between lines so that any part of the system can be reached from any other part on payment of the base

11. See Bruton, *The Income Tax and the Family Partnerships—The Culberston Chapter,* 98 U. OF PA. L. REV. 143 (1949).

12. See Paul, *Family Partnership in Tax Avoidance,* 13 GEO. WASH. L. REV. 121 (1945).

13. INT. REV. CODE §§ 181, 182, and 3797(a). A similar approach has already been taken in reference to short term intra-family trust. The Treasury issued regulations to describe the factors which will make the trust income taxable to the grantor. See U.S. Treas. Reg. 111, §§ 29.22(a)-21, 22 (1942).

1. The Pennsylvania commission is typical of those throughout the country. It is now organized and empowered by PA. STAT. ANN. tit. 66, chap. 7 (Purdon, 1941).

2. BARNES, ECONOMICS OF PUBLIC UTILITY REGULATION (1942).

3. "No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person . . . No public utility shall establish or maintain any unreasonable difference as to rates, either as to localities or as to classes of service . . ." PA. STAT. ANN. tit. 66, § 1144 (Purdon, 1941).

fare and, if necessary, a transfer. Since the necessity to transfer seemed to be caused by traffic patterns adopted by the company itself, an early New York commission ruling disallowed a *charge* on transfers as being discriminatory.[4] A general issuance of free transfers has been ordered when a railway supplied them to some parts of a city and not to others, on the ground that such a practice was discriminatory.[5] The same term has been used by a commission to condemn a system whereby a company serving part of a city was charging for transfers to the lines of another company serving other parts of the city.[6] The California commission refused to allow a tramway to charge for transfers on the ground that certain business localities would be unduly discriminated against by such a fare structure.[7] In general, commissions have seen little realistic basis for finding transfer charges reasonable since transferring itself has no necessary relation to the length of the ride,[8] or the cost to the company, or the value to the user of the service.[9] The only time a commission has ordered such a charge when a revenue increase was deemed necessary was in the case of a San Francisco company where three lines were operating in competition at certain points and any other adjustment would cause a serious shift in patronage.[10] The commission in the instant case reversed accepted rules and held that any free transfer system is discriminatory, and when the base fare is raised to a sufficiently high point such discrimination becomes unreasonable and unlawful.[11]

Equitable distribution of the cost of production to consumers of utility products is extremely difficult since the nature of a utility demands great initial investment in plant and facilities, the cost of which constitutes a non-varying burden upon the enterprise. While a utility product usually cannot be stored the companies are charged with a public duty to supply any instantaneous demand, thus the quantum of investment must be adequate to supply the peak drain.[12] The greatest part of the cost of service rendered therefore is not proportionate to the amount of the product used but to the contribution of that use to the maximum load that the utility must bear at any time. This theory applies to street railways. The greater part of the cost of operating a transit company is the investment in and up-keep of the vehicles themselves. These must be supplied in sufficient number to handle reasonably the maximum demand at all points of the system at any time. The cost of operating any one line is therefore predominately the cost of maintaining the number of vehicles demanded at its most crowded points at the "rush hour". Uncontradicted evidence offered by the company in the instant case showed that the actual cost to the company of any trip is predominately determined by the number of controlling load points the rider passes through at peak hours. The commission's order imposes upon the forty per cent of the car-riders who use transfers

4. *In re* Third Avenue Railway Co., 100 P.U.R. 1916E (N.Y., 1st Dist. 1918).
5. City of Joplin v. S.W. Missouri R.R., 47 P.U.R. 1916E (Mo. 1916).
6. *In re* Capitol Transit Co., 46 P.U.R. (N.S.) 506 (D.C. 1942).
7. *In re* Los Angeles Ry. Corp., 66 P.U.R. 1922A (Cal. 1921).
8. *In re* Norfolk and Bristol St. Railway Co., 411 P.U.R. 1915E (Mass. 1915).
9. *In re* Elmira Water, Light & R.R. Co., 690 P.U.R. 1921B (N.Y., 2d Dist. 1921).
10. *In re* Market Street Railway Co., 20 P.U.R. (N.S.) 278 (Cal. 1937).
11. This somewhat euphuistic rationale might be questioned. In the single-vehicle riders had been paying more than their share of the old costs, a rise in costs would not force them to bear any greater percentage of the total cost. It is difficult, therefore, to see how the discrimination alleged by the commission has, by a base fare rise, become an unreasonable one.
12. TRACHSEL, PUBLIC UTILITY REGULATION (1947).

because of the traffic pattern designed by the company [13] all the increased costs of operation when the facts of the case tend to prove that their use of the facilities costs no more than that of the single-vehicle riders. In view of this, the commission's order could well be said to be discriminatory, but true or not, in such a close case where the revenue gain to the company is the same whichever plan is adopted, the commission should not have substituted its own ideas for those of the company's managers.[14] If the commission did not want merely to boost the base fare because of public pressure, it might have suggested a more economically sound measure, for example, a fare differential to stimulate off-peak usage.[15] The commission here has not only ignored persuasive precedent and the policies of the company's management but has issued an order in conflict with accepted principles of utility economics. However, while the company's proposed plan aroused public indignation, the implementation of the commission's order seemed to dissipate this agitation, which result might, after all, be the true test of the value of a commission decision.

Sales—Perishable Agriculture Commodities Act—Right of Buyer to Reject Under Contract "F. O. B. Shipping Point Acceptance Final," if Fraud is Established—Seller shipped buyer grapes under a contract which provided "f. o. b. shipping point acceptance final". [1] Originally, the grapes had been sold to a consignee in Missouri, who found them somewhat decayed and rejected them. Seller, knowing of this, resold and diverted them to buyer. Upon arrival, buyer, finding substantial decay, promptly rejected and notified seller who brought proceedings before the Secretary of Agriculture under the Perishable Agriculture Commodities Act [2] for damages sustained through buyer's rejection. The award of reparations to the seller was reversed and remanded since buyer under contract "f. o. b. shipping acceptance final" has a right to reject shipment, *if* fraud is established. *Joseph Martinelli Co., Inc. v. Simon Siegel Co.,* 176 F. 2d 98 (1st Cir. 1949).

At common law fraud rendered all contracts voidable, and a buyer induced to enter a contract by the fraud of a seller, had the right to repudiate the contract and to refuse the goods.[3] Section 73 of the Uniform Sales Act does not change this doctrine.[4] However, the federal Perishable

13. Indeed, company managers showed that the Philadelphia system was laid out so that the whole city, by the use of transfers, would be persuaded to use the subway and elevated lines to reach and leave the city's center.

14. "The commission is no 'super board of directors' ", *see* Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Commission, 333 Pa. 265, 267, 5 A.2d 133, 134 (1939).

15. Such a plan, along with other innovations met with success in Milwaukee, Wisconsin, *In re* Milwaukee Electric Rwy. & Light Co., 289 P.U.R. 1931E (Wis. 1931).

1. This term has been defined under the Perishable Agriculture Commodities Act to mean that the buyer accepts the produce f.o.b. cars at shipping point *without recourse.* Simon Siegel Co. v. Joseph Martinelli Co., 6 A.D. 778 (1949). *Cf.* 7 CODE FED. REGS. § 46.24(m).

2. 46 STAT. 531 (1930), as amended, 7 U.S.C. § 499a *et. seq.* (1946).

3. *E.g.,* Pike's Peak Paint Co. v. Masury, 19 Colo. App. 286, 74 Pac. 796 (1903); Como Orchard Land Co. v. Markham, 54 Mont. 438, 171 Pac. 274 (1918); Allan v. Lake, 18 Q.B. 560, 118 Eng. Rep. 212 (1852); BENJAMIN, SALES 446, 472 (5th ed. 1906).

4. This provision states, in effect, that in cases of fraud the common law shall apply. Hostler Coal & Lumber Co. v. Stuff, 205 Iowa 1341, 219 N.W. 481 (1928); 5 WILLISTON, CONTRACTS § 1523 (Rev. ed. 1937). See also A.L.I., UNIFORM COMMERCIAL CODE § 2-723 (May, 1949 Draft).

Agriculture Commodities Act makes it unlawful for a buyer to reject "without reasonable cause" any perishable agricultural commodity sold in interstate commerce.[5] "Without reasonable cause" has been interpreted to include a rejection for *any* reason of a commodity sold under a contract "f. o. b. shipping point acceptance final".[6] Under such an interpretation the buyer *must* accept the commodity and his only remedy is to proceed under the Act to recover damages.[7] Faced, for the first time,[8] with the issue of whether seller's fraud should enlarge the buyer's rights under the Act, the court relied on common law principles and held that the buyer may reject. The court proceeded on the theory that the Act presupposes a valid contract, and contracts induced by fraud may be avoided at the election of the person defrauded. The buyer in the instant case elected to reject the goods, the contract became void, and the Act became inapplicable.

The purpose of the Perishable Agricultural Commodities Act was to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities.[9] It was designed for the protection of the seller so that when certain limiting phrases such as "f. o. b. shipping point acceptance final" were used in the contract, the burden of disposing of the goods would be placed on the buyer.[10] The objective was to prevent produce from becoming distress merchandise in a declining market. This was accomplished by discouraging unwarranted rejections of produce, which would ordinarily be at a point so distant that it would be too expensive for the seller to enforce his legal rights.[11] The purpose of using such limiting phrases was to protect the seller from fraud on the part of the buyer, *not* to protect a fraudulent seller. In this situation, therefore, the buyer's rights must be the same as those which existed prior to the passage of the Act, *i. e.,* the right to reject where he has been defrauded by the seller. The Court in the instant case left open the question of what constitutes fraud. A narrow interpretation of fraud might achieve the result that nothing would take a case out of the Act; whereas under a liberal interpretation almost any breach of warranty might be called fraud, thus emasculating the Act. Therefore, the impact of the present decision will depend upon how courts in the future interpret what quantum of fraud is necessary to give a buyer the right to reject.[12] To reach a result that would be most in line with the spirit of the Act, fraud should be held to exist *only* where the seller knew at the time of the sale that the goods were defective.

---

5. 46 STAT. 531 (1930), as amended, 7 U.S.C. § 499b(2) (1946).

6. *E.g.,* L. Gillarde Co. v. Martinelli & Co., 168 F.2d 276 (1st Cir. 1948), *amended on rehearing,* 169 F.2d 60 (1st Cir. 1948); Le Roy Dyal Co. v. Allen, 161 F.2d 152 (4th Cir. 1947); Nick Argondelis v. Senter Bros., Inc., 4 A.D. 420 (1945); D. B. Bruno & Co., Inc. v. S. Goldsamt, Inc., 1 A.D. 605 (1942). None of these cases involved seller's fraud.

7. 46 STAT. 531 (1930), as amended, 7 U.S.C. § 499f(a-e) (1946); Le Roy Dyal Co. v. Allen, *supra.*

8. Instant case at p. 101.

9. 72 CONG. REC. 8537 (1930).

10. For other phrases reaching the same result see 7 CODE FED. REGS. § 4624 (1949).

11. L. Gillarde Co. v. Martinelli & Co., 169 F.2d 60 (1st Cir. 1948); Le Roy Dyal Co. v. Allen, *supra;* SEN. REP. No. 6, 71st Cong., 1st Sess. 2 (1929); 72 CONG. REC. 8538 (1930).

12. The Court, however, did hold that if the defrauded party to a contract breaks it before he discovers the fraud, he may nevertheless assert the fraud as a defense as soon as he discovers it.

Taxation—Constitutional Limitation on Jurisdiction to Impose Slack Tax—Decedent, a resident of Wisconsin, died leaving an estate consisting of tangible property, 86% of which was located in that state and the remainder in two other states. Wisconsin, in addition to its ordinary inheritance tax,[1] imposed a slack tax [2] designed to take full advantage of the 80% state credit provisions provided by the Federal Estate Tax.[3] This slack tax was computed by deducting from the Federal credit on the entire estate an allowance for any inheritance taxes paid not only to Wisconsin but also to other states. In addition, Wisconsin attempted to levy an emergency tax [4] which amounted to 30% of all taxes it had previously collected. The state supreme court sustained the emergency tax on the ground that, since more than 80% of the estate was located within its borders, Wisconsin had not exceeded its jurisdiction in basing the tax on the full amount of the credit since such credit was, in turn, based upon 80% of the Federal Tax.[5] On appeal, the judgment was reversed on the ground that the tax constituted an unconstitutional attempt to tax the inheritance of tangible property outside Wisconsin's jurisdicion. *Treichler v. State,* 70 Sup. Ct. 1 (1949).

While the effort to determine a single tax situs in the administration of the due process clause has been abandoned with respect to intangible property,[6] the instant case reaffirms its application with respect to tangible property.[7] The several states have generally followed two methods in determining their jurisdiction with respect to the slack tax. Some states determine the federal credit to be used as the basis for its slack tax, by pro rating the share of such credit to the property within the state regardless of the taxpayer's domicile.[8] Under this view, while the tax in another state may more than absorb the entire credit, no constitutional objection is presented since no state purports to tax other than property within its jurisdiction.[9] Under the other method, states have limited their slack tax to residents, computing it on the basis of the entire federal credit irrespective of the property's location, but at the same time, allowing deductions for any tax paid to other states.[10] This provision would apparently permit the state to measure the tax on the basis of tangible property outside its jurisdiction since the tax imposed by other states might not absorb all of their pro rata share of the federal credit leaving some credit subject to the domiciliary's tax. Nevertheless, litigation on this point has been inhibited because the taxpayer, who must pay the same amount of tax to the Federal Government if the state tax is invalidated, is not in a position to show sufficient injury to challenge the state imposition.[11] In the instant case, however, the additional 30% tax fur-

1. WIS. STAT. § 72.01-72.24 (1947).
2. WIS. STAT. § 72.506 (1947).
3. INT. REV. CODE § 813b. The proportion of the credit is less than 80% of the total federal tax today since the 80% is based only on the 1926 rates.
4. WIS. STAT. § 72.74(2) (Post war relief measures).
5. 35 N.W.2d 404 (Wis. 1949).
6. Greenough v. Tax Assessors of Newport, 331 U.S. 486 (1947); Utah v. Aldrich, 316 U.S. 174 (1942); Curry v. McCanless, 307 U.S. 357 (1939).
7. Frick v. Pennsylvania, 368 U.S. 473 (1925) (inheritance tax); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905) (property tax).
8. For a collection of statutes see Perkins, *Federal Estate Tax Credit Clause,* 13 N.C.L. REV. 271 (1934).
9. Simco v. Shirk, 146 Tex. 259, 206 S.W.2d 221 (1947); *But cf. In re* Watson's Estate, 36 N.Y.S.2d 443 (Surr. 1945).
10. See note 8 *supra.* Examples of states having this type legislation are Ohio, Pennsylvania and Wisconsin.
11. *Cf.* Knowles Estate, 295 Pa. 571, 145 Atl. 797 (1929).

nished the injury giving the taxpayer standing. The contention that the tax was based on property within the state since its percentage was more than that of the Federal credit is without foundation.[12] The instant court, as a matter of fact, ignored it in finding this levy an unconstitutional attempt to tax tangibles outside the jurisdiction. Thus, at least by inference, the court indicated that the method of computing the slack tax used was itself subject to constitutional objection.

With but one dissent, the decision reaffirms the single tax situs doctrine as applied to tangible property in the face of strong criticism of the doctrine.[13] Much of the justification for the doctrine of a single tax situs has been a desire to prevent more than one state from imposing a tax on the same property.[14] The instant case represents a situation where even this justification is absent since the tax under attack automatically prevents double taxation by allowing the taxpayer to deduct the taxes imposed by other states on the same property.[15] The effect of this decision with respect to slack taxes is to cast doubt upon the validity of one of the methods of computing the slack tax, *viz.*, deducting taxes paid to other states from the entire federal credit. Such a method of computing the slack tax would seem to be a desirable means of enabling a state to provide a greater degree of equality between those of its residents with property outside the state and those with property totally within. By comparison, the pro rating of the federal credit on the basis of the property within the state leaves the resident taxpayer affected by rates in other jurisdictions sufficiently high to absorb more than their share of the federal credit. Nevertheless, no serious challenge to existing slack tax systems is to be anticipated despite this decision, since, absent the special emergency tax, no taxpayer will probably have sufficient standing to challenge its constitutionality.[16]

12. *See* Frick v. Pennsylvania, *supra*, at 494.

13. *E.g.*, Bittker, *Taxation of Out of State Tangible Property*, 56 YALE L.J. 640 (1947).

14. The result has also been justified on the theory that the property where the state is located alone furnishes sufficient protection to enable it to base its tax on the value thereof. Union Refrigerator Transit Co. v. Kentucky, *supra*. But the state of the owner's residence also furnishes protection to him for which they could logically base their tax on his ability to pay which would take into account tangibles outside the state. See Bittker, *supra* note 13, at 650.

15. *Cf.* Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911) (upholding state tax on ships owned by resident without taxable situs elsewhere).

16. See note 11 *supra*.